BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	)	Case No. 17-1265-EL-AAM

INDUSTRIAL ENERGY USERS-OHIO'S REPLY IN SUPPORT OF MOTION TO DISMISS THE PRICE STABILIZATION RIDER

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
mpritchard@mwncmh.com

October 23, 2017

Attorneys for Industrial Energy Users-Ohio

C0105792:3

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)))))))	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	))))	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	)))	Case No. 17-1265-EL-AAM

INDUSTRIAL ENERGY USERS-OHIO'S REPLY IN SUPPORT OF MOTION TO DISMISS THE PRICE STABILIZATION RIDER

I. INTRODUCTION

On October 13, 2017, Industrial Energy Users-Ohio ("IEU-Ohio") moved to dismiss Duke Energy Ohio, Inc.'s ("Duke") Price Stabilization Rider ("PSR") from its electric security plan ("ESP") application because Duke can prove no set of facts to support authorization of the rider. Duke failed to provide a detailed description of the PSR in its application and failed to support its request with testimony. Duke's testimony further concedes that it does not intend to advance its proposal in this proceeding. IEU-Ohio further demonstrated that the PSR could not be approved because it was unlawful for several reasons.

In its memorandum opposing the motion to dismiss, Duke argues that IEU-Ohio's motion to dismiss was procedurally improper, that its PSR is different than an unlawful transition charge, and that the PSR was distinguishable from the charge authorized by the Maryland Public Service Commission ("Maryland Commission") that the U.S. Supreme Court found was preempted. Duke's arguments are without merit.

II. ARGUMENT

A. Dismissal of a Term of Duke's ESP Application, the PSR, is Proper and Within the Commission's Authority

Because Duke's request for authorization of the PSR fails to comply with the minimal requirements of Public Utilities Commission of Ohio ("Commission") rules, the Commission may lawfully and summarily dismiss that request. As set forth in IEU-Ohio's motion to dismiss, the Commission is not strictly bound by the Ohio Rules of Civil Procedure, but should follow them where appropriate.[1] Without citation, Duke claims that "the Commission's past practices and its attention to justice and due process are far more important" than following the Ohio Rules of Civil Procedure and, therefore, the Commission should not consider a motion to dismiss a claim from an ESP application.[2] However, past Commission practice as well as attention to justice and due process weigh in support of the Commission considering and granting IEU-Ohio's motion to dismiss.

Initially, the Commission has granted motions to dismiss in the past without hearing when an applicant has sought relief that the Commission could not lawfully authorize. In a 2009 case, the Commission granted a motion to dismiss filed by several intervenors of

[1] Motion of Industrial Energy Users-Ohio to Dismiss the Request by Duke Energy Ohio, Inc. for Authorization for a Price Stabilization Rider and Memorandum in Support at 5-6 ("IEU-Ohio Motion to Dismiss"); R.C. 4903.082.

[2] Duke Energy Ohio's Memorandum Contra Motion to Dismiss at 2 ("Duke Memo Contra").

an electric distribution utility's ("EDU") application for inclusion of certain projects in its energy efficiency and peak demand reduction ("EE/PDR") compliance plan because the application demonstrated that the projects did not meet statutory requirements.[3]

In a 2011 case, the Commission granted a motion to dismiss a request by the Office of the Ohio Consumers' Counsel ("OCC") for a show cause order against AT&T Ohio because an intervening change of law rendered the request for the show cause order moot.[4]

In a 2004 case, the Commission granted a motion filed by a railroad track owner seeking dismissal of an application for an exemption of the requirement for school buses and carriers of hazardous materials to stop at a railroad crossing. The dismissal was granted after the Commission Staff submitted a letter demonstrating that the crossing did not meet the statutory requirements for an exemption.[5]

In a 1989 case, the Commission granted a motion to dismiss an application seeking a boundary change for a telephone exchange because the application failed to state sufficient facts to support a finding that service was inadequate as required by the applicable statutes.[6]

---

[3] *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case Nos. 09-384-EL-EEC, *et al*., Entry at 2-3 (Dec. 16, 2009).

[4] *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case Nos. 06-1013-TP-BLS, *et al*., Entry at 4 (May 19, 2011).

[5] *In the Matter of a Request for an Exemption from Stopping for School Buses and Other Motor Vehicles at the Highway/Railroad Grade Crossing Located at U.S. Route 6 (477-636E), Village of Napoleon, Henry County*, Case No. 03-2524-RR-RCP, Entry at 1-2 (June 2, 2004).

[6] *In the Matter of the Petition of Thelma Penwell and Other Subscribers of the Amanda Exchange of GTE North Inc., Requesting a Boundary Change*, 1989 Ohio PUC LEXIS 818 (Aug. 9, 1989).

This litany of cases demonstrates that the Commission has frequently and properly exercised its authority to dismiss an application without hearing when the application and supporting materials demonstrate that the Commission is without authority to grant the relief requested in the application.[7] IEU-Ohio made such a demonstration in its motion to dismiss.

Furthermore, attention to justice and due process, as Duke puts in, also supports a dismissal of its PSR request in this proceeding. As set forth in IEU-Ohio's motion to dismiss, Duke has failed to present the information required by the Commission, and such a failure prevents Duke from meeting its statutory burden of proof. Furthermore, Duke acknowledges in its prefiled testimony that it does not intend to advance or litigate the PSR in this proceeding. As such, Duke has failed to comply with the regulatory and statutory requirements to make a prima facie showing that it is entitled to relief. Because Duke has been provided every opportunity to present its case, and has simply elected to not do so in this proceeding, Duke has been provided due process and the interests of justice warrant a dismissal of the PSR to prevent intervening parties wasting resources addressing the PSR.

B. The PSR is an Unlawful Transition Charge

As discussed in IEU-Ohio's motion to dismiss, since the Commission authorized Duke's placeholder PSR, the Ohio Supreme Court has held that the prohibition on collecting transition revenue or its equivalent applies to charges authorized under the ESP

[7] In one instance, a former Commissioner chastised the Commission for failing to summarily dismiss a Duke application that parties moved to dismiss because the relief Duke sought would violate terms of an approved stipulation. *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.,* Opinion and Order, Concurring Opinion of Commissioner Lynn Slaby (Feb. 13, 2014).

statute.[8] Like the other charges the Ohio Supreme Court struck down, the PSR would allow Duke to collect transition revenue or its equivalent.[9]

Duke responds that the cases striking down transition charges for AEP-Ohio and The Dayton Power and Light Company ("DP&L") are not relevant to its PSR and that the PSR is distinguishable from a transition charge. Duke's argument is without merit.

Initially, Duke's assertion that the AEP-Ohio and DP&L cases are not relevant is not credible since Duke relies on those cases to support authorization of the PSR. Duke's application provides that its request that the PSR should be extended under R.C. 4928.143(B)(2)(d) is consistent with the Commission's approval of nonbypassable charges for AEP-Ohio and DP&L in their second ESPs.[10] In the appeals of each of those cases, the Supreme Court of Ohio reversed the Commission orders authorizing those charges. As Duke acknowledges in its application, these charges (now reversed by the Court) are relevant to the legality of Duke's PSR.

Furthermore, Duke's claim that the PSR is somehow different than AEP-Ohio's and DP&L's unlawful transition charges because the PSR is not a "lost-revenue recovery rider" is incorrect. Just like AEP-Ohio's and DP&L's charges, the PSR is designed to collect the revenue Duke cannot secure in the competitive market. The nature of the PSR is a calculation of the difference between Duke's costs under the Inter-Company Power Agreement ("ICPA") and the wholesale market revenue. When the PSR is a charge, by definition, it is collecting revenue that cannot be secured in the competitive market. Although Duke tries to emphasize the potential price stabilization benefits of the PSR, the

[8] IEU-Ohio Motion to Dismiss at 9-13.

[9] *Id.*

[10] Application at 17-18.

Court has made clear when it rejected similar claims for AEP-Ohio and DP&L that it is the true nature of the charge that is relevant to the consideration of whether a charge is a transition charge.[11] The true nature of the PSR is to collect transition revenue or its equivalent, which cannot otherwise be recovered in the competitive generation market.

C. The PSR is Not Distinguishable from the Charge the U.S. Supreme Court Found Preempted

In *Hughes v. Talen Energy Marketing LLC*, 578 U.S. __ (2016), the U.S. Supreme Court held that state authorized programs were preempted when the state program set retail compensation tethered to wholesale rates in a manner designed to provide a different level of compensation than that authorized under the federally-authorized wholesale rates.[12] Duke claims that this decision is distinguishable because Duke is not the generator and because the PSR does not modify the wholesale rate. Duke's claims are without merit.

In *Hughes*, the Maryland Commission guaranteed an independent generator that it would receive the pricing in the contract approved by the Maryland Commission.[13] The scheme further required the generator to bid into and clear in the wholesale market.[14] If the wholesale market revenue was less than the contract price, then the Maryland Commission required the regulated utility to pay the generator the difference.[15] If the wholesale market price was above the contract price, the generator was required to pay

[11] *See* IEU-Ohio Motion to Dismiss at 12 (*citing In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, ¶ 22).

[12] *Id.* at 13-16 (*citing Hughes v. Talen Energy Marketing LLC*, 578 U.S. __ (2016)).

[13] *Id.*

[14] *Id.*

[15] *Id.*

the difference to the regulated utility.[16] Any amounts paid by or to the regulated utility were charged to the utility's customers on a nonbypassable basis.

Just like the scheme at issue in *Hughes*, the regulated utility was not the actual generator.[17] Like the scheme at issue in *Hughes*, the difference between the contract "cost-based" price and the wholesale market price was to be charged to the utility and passed through by the regulated distribution utility to its customers on a nonbypassable basis.[18] These facts are not in dispute and are wholly inconsistent with the claims made by Duke to support its argument that *Hughes* is distinguishable. Based on *Hughes*, the Commission is preempted from authorizing Duke to include its Ohio Valley Electric Corporation ("OVEC") interest in the PSR. Accordingly, the request for authorization should be dismissed.

III. CONCLUSION

As demonstrated in IEU-Ohio's motion to dismiss and herein, Duke's request to extend the placeholder PSR should be dismissed. Based on the information presented in its application and testimony, or lack thereof, Duke can prove no set of facts to support the authorization of the extension of the PSR. Moreover, since the Commission authorized the placeholder PSR for Duke in its prior ESP proceeding, the Ohio Supreme Court and U.S. Supreme Court have held that charges like the PSR are unlawful transition charges and are preempted by federal laws and regulations. To prevent the waste of

[16] *Id.*

[17] *Id.*

[18] *Id.*

Commission and customer resources on a request for authorization for which Duke offers no lawful justification, the Commission should grant IEU-Ohio's motion to dismiss.

Respectfully submitted,

/s/ Matthew R. Pritchard

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
McNees Wallace & Nurick LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

Certificate of Service

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Reply in Support of Motion to Dismiss the Price Stabilization Rider* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 23rd day of October 2017, *via* electronic transmission.

/s/ Matthew R. Pritchard
Matthew R. Pritchard

Amy B. Spiller (Reg. No. 0047277)
(Counsel of Record)
Deputy General Counsel
Jeanne W. Kingery (Reg. No. 0012172)
Elizabeth H. Watts (Reg. No. 0031092)
Rocco D'Ascenzo (Reg. No. 0077651)
Associate General Counsel
139 East Fourth Street, 1303-Main
PO Box 961
Cincinnati, OH 45201-0960
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Elizabeth.watts@duke-energy.com
Rocco.d'ascenzo@duke-energy.com

Counsel for Duke Energy Ohio, Inc.

Michael L. Kurtz (Reg. No. 0033350)
Jody Kyler Cohn (Reg. No. 0085402)
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Counsel for the Ohio Energy Group

BRUCE WESTON (Reg. No. 0016973)
OHIO CONSUMERS' COUNSEL

William J. Michael (Reg. No. 0070921)
(Counsel of Record)
Kevin Moore (Reg. No. 0089228)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov

Dane Stinson (Reg. No. 0019101)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
dstinson@bricker.com

Counsel for the Office of the Ohio Consumers' Counsel

Kimberly W. Bojko (Reg. No. 0069402)
(Counsel of Record)
James D. Perko, Jr. (Reg. No. 0093312)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Perko@carpenterlipps.com

Counsel for the Ohio Manufacturers' Association Energy Group

Colleen L. Mooney (Reg. No. 0015668)
Ohio Partners for Affordable Energy
P.O. Box 12451
Columbus, OH 43212-2451
cmooney@ohiopartners.org

COUNSEL FOR THE OHIO PARTNERS FOR AFFORDABLE ENERGY

Madeline Fleisher (Reg. No. 0091862)
Environmental Law & Policy Center
21 W. Broad St., Suite 500
Columbus, OH 43215
mfleisher@elpc.org

COUNSEL FOR ENVIRONMENTAL LAW & POLICY CENTER (ELPC)

Carrie M. Harris (Reg. No. 0096138)
Spilman Thomas & Battle, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, NC 27130
charris@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com

Lara R. Brandfass
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
lbrandfass@spilmanlaw.com

COUNSEL FOR WAL-MART STORES EAST, LP AND SAM'S EAST, INC.

Angela Paul Whitfield (Reg. No. 0068774)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps.com

COUNSEL FOR THE KROGER CO.

Richard L. Sites (Reg. No. 0019887)
Regulatory Counsel
Ohio Hospital Association
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Rick.sites@ohiohospitals.org

Dylan F. Borchers (Reg. No. 0090690)
Devin D. Parram (Reg. No. 0082507)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
dborchers@bricker.com
dparram@bricker.com

COUNSEL FOR THE OHIO HOSPITAL ASSOCIATION

Elyse Akhbari
(Counsel of Record)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
eakhbari@bricker.com

COUNSEL FOR PEOPLE WORKING COOPERATIVELY, INC.

Trent Dougherty (Reg. No. 0079817)
(Counsel of Record)
Miranda Leppla (Reg. No. 0086351)
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212-3449
tdougherty@theOEC.org
mleppla@theOEC.org

COUNSEL FOR THE OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND

Joseph Oliker (Reg. No. 0086088)
(Counsel of Record)
Michael Nugent (Reg. No. 0090408)
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
joliker@igsenergy.com
mnugent@igsenergy.com

COUNSEL FOR IGS ENERGY

Steven D. Lesser (Reg. No. 0020242)
James F. Lang (Reg. No. 0059668)
N. Trevor Alexander (Reg. No. 0080713)
Mark T. Keaney (Reg. No. 0095318)
Calfee, Halter & Griswold LLP
41 South High Street,1200 Huntington Center
Columbus, OH 43215
slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com

COUNSEL FOR THE CITY OF CINCINNATI

Michael D. Dortch (Reg. No. 0043897)
Richard R. Parsons (Reg. No. 0082270)
Justin M. Dortch (Reg. No. 0090048)
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
mdortch@kravitzllc.com
rparsons@kravitzllc.com
jdortch@kravitzllc.com

COUNSEL FOR CALPINE ENERGY SOLUTIONS, LLC

Mark A. Whitt (Reg. No. 0067996)
Andrew J. Campbell (Reg. No. 0081485)
Rebekah J. Glover (Reg. No. 0088798)
Whitt Sturtevant LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, OH 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

COUNSEL FOR RETAIL ENERGY SUPPLY ASSOCIATION & DIRECT ENERGY SERVICES, LLC, DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY BUSINESS MARKETING, LLC

Mike Dewine
ATTORNEY GENERAL

Michael J. Setineri (Reg. No. 0073369)
Special Assistant Attorney General
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com

ON BEHALF OF MIAMI UNIVERSITY AND THE UNIVERSITY OF CINCINNATI

Michael J. Setineri (Reg. No. 0073369)
(Counsel of Record)
Gretchen L. Petrucci (Reg. No. 0046608)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com
glpetrucci@vorys.com

ON BEHALF OF CONSTELLATION NEWENERGY, INC. AND EXELON GENERATION COMPANY, LLC

Steven Beeler (Reg. No. 0078076)
Assistant Attorney General
Public Utilities Section
Office of the Ohio Attorney General
30 East Broad Street, 16th Floor
Columbus, OH 43215
steven.beeler@ohioattorneygeneral.gov

COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Patricia Schabo
Nicholas Walstra
Legal Department
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215
Patricia.schabo@ puc.state.oh.us
Nicholas.Walstra@puc.state.oh.us

ATTORNEY EXAMINERS